SUPREME COURT, U. S.

OCT 12 1968

JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 161

THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,
VERSUS
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, and DAVY C. MANER,
Respondents,
and
THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,
VERSUS
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY and LEE F. WHITE, O. R. SMILEY, and MAMIE SMILEY,
Respondents,
and
THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,
VERSUS
C. G. SHULL, JR., and RUBY MAE SHULL, PHOEBE JO SHULL now JONES and J. B. JONES, GEORGE E. SHELTON and WYNONA A. SHELTON, HAL WELCH and JO WELCH,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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October, 1968

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TABLE OF CONTENTS

	PAGE
Statement	1
Response to "Question Presented"	4
Reply to "Reasons for Granting the Writ"	5
Reply to Petitioners' Heading "The Second Proviso of Section 14 of the Act of April 26, 1906, Was Intended Only to Apply to Narrow Strips and Gores Which Had No Substantial Value as Separate Tracts."	6
Reasons Why the Writ Prayed for by Petitioners Should Not Be Granted	7
1. If the disposal of the contingent reversionary interests involved herein was wrongful, Appellants' remedy is to seek compensation from the United States	7
2. A strong presumption exists in favor of constitutionality of Act of April 26, 1906	8
3. The United States as guardian had power to manage tribal land and affairs for the protection and welfare of the Indians	9
4. The reversionary interests in railroad easements were of no value in 1906 at the time of disposition	13
5. The second proviso of Section 14 is such an integral part of the Act of April 26, 1906, that if it is held to be unconstitutional, the entire Act falls	16
Conclusion	17

TABLE OF AUTHORITIES

PAGE

CASES:

Bowers v. Atchison, Topeka & Santa Fe Railway Company, 119 Kan. 202, 237 Pac. 913, 42 A.L.R. 228 (cited in U.S. v. Magnolia Pet. Co., 110 Fed. 212 15-16

Buttz v. Northern Pac. R.R., 119 U.S. 55 5

Cherokee Nation v. Hitchcock, 187 U.S. 294 10

Chickasha Cotton Oil Co. v. Town of Maysville, 249 F.2d 542 17

Chippewa Indians v. U. S., 301 U.S. 358 10

Choate v. Trapp, 244 U.S. 665 10

Choctaw Nation v. United States, 119 U.S. 1 6

Home Tel. Co. v. Los Angeles, 211 U.S. 265 9

Lone Wolf v. Hitchcock, 187 U.S. 553 9

Missouri, K. & T. Ry. v. Roberts, 152 U.S. 114 5

New Mexico v. U. S. Trust Co., 172 U.S. 171 14-15

Shoshone Tribe v. United States, 299 U.S. 476 ..... 6, 8

Sinking-Fund Cases, 99 U.S. 700 8

Stephens v. Cherokee Nation, 174 U.S. 445 11-12

Sweet v. Rechel, 159 U.S. 380 9

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 5

Tiger v. Western Investment Co., 221 U.S. 286 10

United States v. Creek Nation, 295 U.S. 103 ..... 6, 8, 10

United States v. Klamath Indians, 304 U.S. 119 ..... 7-8, 10

United States v. Magnolia Petroleum Company, 110 F.2d 212 ..... 3, 4, 7, 16

Western Union Tel. Co. v. Penn R.R., et al., 195 U.S. 540 15

STATUTES:

32 Stat. 43 ..... 2, 6

32 Stat. 641, Sec. 26 13

32 Stat. 716, Sec. 24 13

34 Stat. 137 3

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

(All emphasis ours)

In the three cases which have been combined in this Court for briefing, the United States District Court for the Eastern District of Oklahoma, in the *Santa Fe* case, sustained

a motion to dismiss, and in the two other cases it sustained motions for summary judgments. In these suits Petitioners seek to quiet title to lands subject to easements, which had been acquired by railroads under the Act of February 28, 1902 (32 Stat. 43) for reservoirs to supply water for their steam locomotives, alleging that their use for such purpose had been abandoned.

The reservoir easements herein were all acquired pursuant to Sections 13 and 14 of the Act of February 28, 1902 (32 Stat. 43), commonly referred to as the Enid and Anadarko Act. This Act authorized the acquisition by condemnation of easements for all railroad purposes through the Indian Territory. Rights of way easements were in general limited to 100 feet in width, with additional ground for station grounds, buildings, depots, etc. It also provided that additional lands, not exceeding 40 acres at any one place, might be condemned when necessary for yards, tool houses, turntables, machine shops, water stations, and other facilities "and when necessary for a good and sufficient water supply in the operation of any railroad * * * shall have the right to take and condemn additional lands for reservoirs for water stations, and for such purpose shall have the right to impound surface water or build dams across any creek, draw, canyon, or stream. * * *" The reason lands to be taken for reservoirs were not limited in area was because their size, of necessity, was dependent on the topography of the country. The reservoir easement in the Santa Fe case was for approximately 200 acres, while the reservoir easements in the companion cases were for 32 acres in the St. Louis-San Francisco Railway Company case and for 40 acres in the Shull case.

Congress subsequently passed the Act of April 26, 1906 (34 Stat. 137) styled "*An Act to provide for the final disposition of the affairs of the Five Civilized Tribes of the Indian Territory and for other purposes.*" Petitioners are two of the Five Civilized Tribes. This Act goes into great detail as to just how this winding up process was to be accomplished. All unallotted and surplus lands of the Tribes were to be sold along with all tribal buildings, whether used for governmental or school purposes, together with furniture, and the money deposited in the treasury of the United States. The tribal existence was to continue until otherwise provided by law but the Tribes were shorn of all power.

In disposing of all tribal property, it was necessary to dispose of reversionary interests in lands subject to all kinds of easements. The method of disposition provided in Section 14 of the Act was divided into two categories based upon the use to which the easements were devoted:

One. Lands "*granted for the use and benefit of any person, corporation, or organization should be conveyed to the person, corporation, or organization entitled thereto.*" No monetary consideration was required for these conveyances—evidently the United States as guardian considered the benevolent purposes to which the easements were devoted as sufficient. "Some of the tracts reserved consisted of 160 acres each, some of 80 acres, and some were smaller" (*United States* v. *Magnolia Petroleum Company*, 110 F.2d 212, 216).

Two. The second category comprised lands subject to railroad easements, which were not to be conveyed to the holder of the easement as was the case of the lands in the

first category, but the railroads were given an opportunity to acquire title upon the payment of a price to be fixed by the Secretary of the Interior. Should a railroad determine not to acquire the reversionary interest, the lands subject to the easements upon abandonment, *"shall thereupon vest in the owner of the legal subdivision of which the lands so abandoned is a part, except lands within a municipality, the title to which upon abandonment shall vest in such municipality."* (Italics ours.)

(An excellent analysis of the Act will be found in *U. S.* v. *Magnolia Petroleum Co.*, 110 F.2d 212.)

RESPONSE TO "QUESTION PRESENTED"

(Petitioners' Brief page 3)

We can understand from Petitioner's statement of the "Question Presented" as to the possible reason this Court requested a Response. It must have been somewhat confused as to why Respondents were made parties to quiet title suits when Petitioners state that the question involved *herein* is as to the right of the United States to "give lands, the fee simple title to which is vested in the Indian tribe to others *without rendering or assuming an obligation to render just compensation for them.*" The United States, which Petitioners claim assumed an obligation to render just compensation to them, is not a party to these suits.

REPLY TO "REASONS FOR GRANTING THE WRIT"

(Petitioners' Brief page 8)

Petitioners, under their first heading (page 8), complain that the opinion herein is in conflict with certain decisions of this Court, and under their next heading urge (page 11), that the lower court misconstrued this Court's opinion in *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272.

Petitioners, in the court below, attacked certain prior decisions of the Circuit Court upholding the validity of Section 14 of the Act of April 26, 1906, on the ground that the court therein erroneously applied the law, as announced by this Court in *Missouri, K. & T. Ry.* v. *Roberts,* 152 U.S. 114 and *Buttz* v. *Northern Pac. R.R.,* 119 U.S. 55. In those cases this Court was dealing with *Indian title,* a mere right of occupancy, as distinguished from cases involving fee title lands. It is perfectly apparent from the lower court's opinion that it clearly understood the difference, although both classes of land could be disposed of by the United States. In the case of Indian title lands, the United States was the owner of the fee and as to fee lands of the Tribes, the United States had the authority, as guardian, to dispose of its wards' property.

In the opinion below, the Court quotes from *Tee-Hit-Ton Indians* v. *United States, supra,* as follows:

> "No case in this court has ever held that taking of Indian title or use by Congress required compensation."

Petitioners construe this quotation, dealing with Indian title lands only, as being applicable herein to fee lands.

In the two paragraphs of its opinion following the above quotation, the lower court points out that land held by petitioners herein was subject to control and management by the United States and that the United States, in exercising its control, could dispose of its wards' lands if it acted in good faith and for the best interests of its wards.

In the first of these two paragraphs, the lower court, as its authority quotes from *United States* v. *Creek Nation,* 295 U.S. 103, 109 and *Choctaw Nation* v. *United States,* 119 U.S. 1, 27, and cites *Shoshone Tribe* v. *United States,* 299 U.S. 476, 497.

REPLY TO PETITIONERS' HEADING "THE SECOND PROVISO OF SECTION 14 OF THE ACT OF APRIL 26, 1906, WAS INTENDED ONLY TO APPLY TO NARROW STRIPS AND GORES WHICH HAD NO SUBSTANTIAL VALUE AS SEPARATE TRACTS."

(Petitioners' Brief page 14)

The argument that Congress only intended the second proviso of Section 14 of the Act of April 26, 1906 to dispose of small strips of land, such as land subject to rights-of-way easements, was rather summarily disposed of by the court below as follows: "The argument runs contrary to the language of the statute."

Petitioners cite no authority for their position, but rely on what they state was *common knowledge* when the Act was passed in 1906. If such common knowledge in fact existed, it apparently had not percolated back to Congress, for nowhere in Section 14 of the Act is any distinction made as to the size of the lands subject to railroad or the other easements disposed of.

In addition in so far as the intent of Congress is concerned it will be observed that in the first portion of Section 14 disposition was made of all lands subject to easements other than such as were subject to railroad easements which were treated separately. "Some of the tracts reserved consisted of 160 acres each, some of 80 acres, and some were smaller." *United States* v. *Magnolia Petroleum Company,* 110 F.2d 212, 216.

It is perfectly clear from the Act as a whole that Congress intended, in its scheme of winding up the affairs of the Tribes, to dispose of all tribal property.

REASONS WHY THE WRIT PRAYED FOR BY PETITIONERS SHOULD NOT BE GRANTED

1. If the disposal of the contingent reversionary interests involved herein was wrongful, Appellants' remedy is to seek compensation from the United States.

Although we are firmly convinced that the Act of April 26, 1906, was clearly for the benefit and protection of the Indians and is constitutional, should we be mistaken and should this Court conclude that something of value belonging to the Tribes had wrongfully been disposed of by Congress, Appellants' remedy is to seek compensation from the United States for its breach of trust. They have no cause of action against Appellees. In *United States* v. *Klamath Indians,* 304 U.S. 119, 123, it was said:

> "It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States *without paying*

*just compensation therefor to appropriate lands of the Indian tribe to its own use or hand them over to others. * * * The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."*

See also:

—*U. S.* v. *Creek Nation*, 295 U.S. 103, 110, 111;

Shoshone Tribe v. *U. S.*, 299 U.S. 476, 497.

2. A strong presumption exists in favor of constitutionality of Act of April 26, 1906.

In approaching the question of the constitutionality of the Section of the Act in question, as well as of the statutes in general, there is a strong presumption in favor of their constitutional validity. In addition there is a strong presumption herein that the United States, acting in its capacity as guardian of the Indians, acted in good faith and for the best interests of its wards in dealing with their affairs and property. Nothing contained in Appellants' complaint or brief casts any cloud on these presumptions. The bare fact that Congress, in Section 14, vested these reversionary interests in railroad easements in the adjoining landowners, usually allottee members of the tribe, or in a municipality in the event the easement was within its borders, is clearly insufficient to overcome these presumptions.

"Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a reasonable doubt" (Sinking-Fund Cases, 99 U.S. 700, 718).

> "But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, *the existence of the circumstances necessary to support it must be presumed.* Talbot v. Hudson, 16 Gray, 417, 422; Fletcher v. Peck, 6 Crouch, 87, 128; Sinking Fund cases, 99 U.S. 700, 718." *Sweet* v. *Rechel,* 159 U.S. 380, 392, 393.

See also:

—*Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 568;

Home Tel. Co. v. *Los Angeles,* 211 U.S. 265, 281.

3. The United States as guardian had power to manage tribal land and affairs for the protection and welfare of the Indians.

That Congress had plenary authority to deal with tribal property and affairs cannot be questioned, and as long as it acts in good faith and in a manner beneficial to its wards, it incurs no obligation to make compensation for any lands taken:

> "That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation* v. *United States,* 119 U.S. 1, 27, and *Stephens* v. *Cherokee Nation,* 174 U.S. 445, 483." *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 567.

"The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for *protection and advancing the tribe,* it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions." *United States* v. *Creek Nation,* 295 U.S. 103, 109.

"Power to control and manage the *property and affairs* of Indians in good faith for *their betterment and welfare* may be exerted in many ways and at times in derogation of the provisions of a treaty." *Shoshone Tribe* v. *U. S.,* 299 U.S. 476, 397.

See also:

—*Cherokee Nation* v. *Hitchcock,* 187 U.S. 294. 306;

Tiger v. *Western Investment Co.,* 221 U.S. 286, 311;

Choate v. *Trapp,* 244 U.S. 665, 671;

Chippewa Indians v. *U. S.,* 301 U.S. 358, 375;

U. S. v. *Klamath Indians,* 304 U.S. 119, 123.

There is no allegation in the petition herein that the United States in disposing of lands subject to railroad easements acted in bad faith, nor that its disposition of such lands was not in the best interests of the Indians and for their betterment and protection.

Let us now turn to the question as to whether the United States as guardian in the winding up of tribal affairs in the manner authorized by Congress, was acting in the best interests of its wards.

In reality, the Act was one of emancipation for the Indians. Congress knew of the shocking conditions existing in the tribal governments, since it had before it reports made by one of its committees and by the Dawes Commission. Excerpts from the reports will be found in the case of *Stephens* v. *Cherokee Nation,* 174 U.S. 445, some of which are as follows:

> "As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians * * *. While we have recognized these tribes as dependent nations, the Government has likewise recognized *its guardianship over the Indians and its obligations to protect them in their property and personal rights*" (p. 450).
>
> "It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government cannot continue. It is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change cannot be much longer delayed. The situation grows worse and will continue to grow worse." (p. 451).
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> * * * * * * *
>
> "The Commission is of the opinion that if citizenship is left, without control or supervision, to the absolute determination of tribal authorities, with power to decitizenize at will, the greatest injustice will be perpetrated, and many good and law-abiding citizens reduced to beggary" (p. 452).
>
> * * * * * * *
>
> "The Commission is compelled to report that so long as power in these nations remains in the hands of those now exercising it, further effort to induce them by negotiation to voluntarily agree upon a change that will

restore to the people the benefit of the tribal property, and that security and order in government enjoyed by the people of the United States will be in vain" (p. 452).

* * * * * * *

"Knowledge of how the power granted to govern themselves has been perverted takes away from the United States all justification for further delay. *Insecurity of life and person and property increasing every day makes* immediate action imperative" (p. 453).

* * * * * * *

"The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report *that those governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they* scarcely pretend to protect" (p. 453).

* * * * * * *

"The condition to which these Five Tribes have been brought by their wide departure in the administration of the governments which the United States committed to their own hands, and in the uses to which they have put the vast tribal wealth with which they were intrusted for the common enjoyment of all their people, has been fully set forth in former reports of the Commission as well as in the reports of Congressional committees commissioned to make inquiry on the ground. It would be but repetition to attempt again a recital. Longer service among them and greater familiarity with their condition have left nothing to modify either of fact or conclusion in former reports, *but on the contrary have strengthened convictions that there can be no cure of the evils engendered by the perversion of these great trusts but their resumption by the Government which created them*" (p. 460).

In view of the deporable conditions existing among the Indians of the Five Civilized Tribes which prompted passage of the Act of April 26, 1906, we are confident this Court will find that Congress acted in the utmost good faith and for the welfare and protection of its wards. Such a finding will dispose of the constitutional question raised by Appellants.

4. The reversionary interests in railroad easements were of no value in 1906 at the time of disposition.

The contingent reversionary interests in both classes of easements covered by Section 14 had to be disposed of before the winding up of the affairs of the tribes could be completed. The contingent interests in the first category of easements in Section 14 were vested in the persons or institutions holding the easements without any monetary consideration. Some of these uses or easements were for 160 acres; some for 80 acres, and others for less. (Easements granted in the Choctaw and Chickasaw tribal lands will be found in the Choctaw-Chickasaw Supplemental Agreement (32 Stat. 641, Section 26) and in the Cherokee lands in Cherokee Allotment Agreement (32 Stat. 716, Section 24).

In the case of railroad easements, however, Congress did not give the contingent reversionary interests to the railroads, but merely gave them options to purchase at prices to be fixed by the Secertary of the Interior. Insofar as we can learn, the railroads were uninterested in these empty options, for just why, as a business proposition, would they pay for something which added no value to the exclusive and perpetual easements which they already had? It is true, when the railroads failed to purchase these contingent re-

versionary interests, Congress might have endeavored to sell them, as it did the surplus and unallotted lands, before it vested title thereto in the adjoining landowners or municipalities, depending on the location of the easements. Such a gesture, however, would have been futile, since no one would even know how to make an intelligent bid for a contingent reversionary interest in one of these far from ordinary easements carrying with it "perpetuity and exclusive use and possession"? (*New Mexico* v. *U. S. Trust Co.*, 172 U.S. 171.)

Congress in vesting these reversionary interests in the adjoining landowners or in municipalities resulted in no injustice to the tribes. They had already, in fact, in the condemnation proceedings, received as damages the full value of the lands assessed, on the theory that the easements would be perpetual and exclusive.

This Court in *New Mexico* v. *United States Trust Co.*, 172 U.S. 171, 183, in discussing the peculiar nature of railroad easements, quoted the following:

> " 'Unlike the use of a private way—that is, discontinuous—*the use of land condemned by a railroad company is perpetual and continuous.*' New York, Susquehanna & Western Railroad v. Trimmer, 52 N.J.L. 1, 3."

This Court then continued:

> "But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, *perpetuity and exclusive use and possession;* also the remedies of the fee, and, like it, corporeal, not incorporeal, property.
>
> "In Smith v. Hall, 72 N.W.Rep. 427, the Supreme Court of Iowa, says, speaking of the right of way of a

railroad: 'The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad which is usually *a permanent improvement, a perpetual highway of travel and commerce, and will rarely be abandoned by non-user. The exclusive use of the surface is acquired and damages are assessed on the theory that the easements will be perpetual; so that ordinarily the fee is of little or no value unless the land* is underlaid by a quarry or mine.'

" 'The right acquired by the railroad company, though technically an easement, yet requires for its enjoyment a use of the land *permanent in its nature and practically exclusive.*' Hazen v. Boston & Maine Railroad, 2 Gray, 574, 580."

To the same effect see:

—*Western Union Tel. Co.* v. *Penn R.R., et al.*, 195 U.S. 540, 570.

In *Bowers* v. *Atchison, Topeka & Santa Fe Railway Company*, 119 Kan. 202, 237 Pac. 913, 42 A.L.R. 228 (cited in *U. S.* v. *Magnolia Pet. Co.*, 110 Fed. 212, at 217), the Supreme Court of Kansas said (p. 234):

"It is true the most unexpected things may happen and it might be that the *Santa Fe Railway system would go out of existence.* In that event, the rule that it has only an easement in its right of way would be applied; but for all practical purposes, including burdens as well as benefits, the railway company is the owner of land acquired for railway purposes. Schaff v. Roberts, 113 Kan. 423, 215 Pac. 447. In the case of Western U. Teleg. Co. v. Pennsylvania R. Co., 195 U.S. 540, 49 L.ed. 312, 25 Sup.Ct.Rep. 133, 1 Ann.Cas. 517, the court said:

" 'A railroad right of way is a very substantial thing. It is more than a mere right of passage. *It is more than*

an easement. We discussed its character in New Mexico v. United States Trust Co., 172 U.S. 186, 43 L.Ed. 413, 19 Sup.Ct.Rep. 881. We there said (page 183) that if a railroad's right of way was an easement it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal property." ' "

The Act of April 26, 1906, certainly will not be declared unconstitutional because it disposed of contingent reversionary rights which had no monetary value in 1906 at the time of disposition.

5. The second proviso of Section 14 is such an integral part of the Act of April 26, 1906, that if it is held to be unconstitutional, the entire Act falls.

Petitioners seek to have this Court strike down the second proviso of Section 14 of the Act of April 26, 1906, on the ground that it is unconstitutional. Should the Court agree with Petitioners' contention, it must then decide whether the section is such an integral part of the Act that it alone cannot be stricken without thwarting the purpose and intent of the Congress. We submit this inseparability is recognized by the Circuit Court in *United States* v. *Magnolia Petroleum Co.*, 110 F.2d 212, 218:

> " 'To say that on failure of a railroad company to make payment of a narrow strip reserved for a right-of-way or on its abandonment for such purpose, title *rests in the tribe, would be inconsistent with the purpose and intent of the statute as a whole, would be out of harmony with the manifest purpose of Section 14, and* would be at variance with the rule against retention of title in remote dedicators. It would be an interpretation not warranted by the language of the section.' "

In *Chickasha Cotton Oil Co.* v. *Town of Maysville*, 249 F.2d 542, the same Court, in referring to the Act, said:

> "It was a comprehensive Act and made meticulous provision for winding up the affairs of the tribes. Section 14 thereof concerned itself with disposition of land reserved from allotment, including reversionary interest in land reserved for railroad right of way purposes.
>
> * * * * * * *
>
> "Under date of June 12, 1908, the Secretary of the Interior, acting through the Commissioner of Indian Affairs, promulgated a regulation governing the acquirement of title by railroad or railway companies occupying land in the former Indian Territory for depots, station grounds, water stations, stock yards, or other uses connected with the maintenance or operation of railroad or railway companies. * * * These several statutory provisions and the regulation promulgated by the Secretary of the Interior *must be considered together as integrated parts of the whole.*"

CONCLUSION

The instant cases are the last of a series extending over many years involving the validity of the disposition by Congress of the reversionary interests in Indian lands subject to railroad easements. In none of these cases, cited in the opinion below, was the Tribe or its successors successful.

It is respectfully urged that the Writ prayed for by petitioners be denied.

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October, 1968